

Resources for Research Participants: criminal prosecutions for HIV transmission

Introduction

In line with best ethical practice in research, this sheet provides further resources for participants in the study who may wish to learn more about the area and issues. Its aim is to provide basic information, and is not intended to be treated as legal advice.

Summary of the Law in England and Wales

It is a criminal offence for a person to infect another person with HIV (or any other serious STI) if they do so either intentionally or recklessly.

- A person (A) transmits HIV intentionally either when it is A's purpose to infect another person (B) or where transmission is virtually certain to occur and A knows this. It follows that proving intentional transmission is extremely difficult. There have been no convictions in England and Wales for intentional transmission.
- A person (A) transmits HIV recklessly when he / she is aware of the risk of transmission at the relevant time and transmission occurs. In order for a person to be reckless in English criminal law they must understand how HIV is transmitted and either have a diagnosis of HIV or be "wilfully blind" to the fact that they are HIV positive (e.g. they have symptoms consistent with HIV infection and have been advised by a doctor that this is the case and that they should get tested).

It is not a criminal offence in England and Wales merely to expose a person to the risk of HIV transmission. For example, a person with diagnosed HIV who has unprotected sex with a partner, but HIV is not transmitted, commits no offence. In theory it is possible to be prosecuted for attempting to transmit HIV, but this would only result in a conviction if it could be established that it was the person's purpose to infect his / her partner.

There is no legal obligation for a person living with HIV to disclose his / her status to a partner in situations where there is a risk of onward transmission. However, a failure to disclose status prior to sex which carries the risk of transmission will mean that the non-discloser cannot argue that the partner consented to the risk if transmission in fact occurs.

Where a person discloses his / her HIV positive status to a partner in advance of sex which carries the risk of transmission, and the partner consents to the risk, no offence is committed even if HIV is in fact transmitted. The same is true in the rarer case where the partner knows that the person is HIV positive as the result of information gained from another source.

For further information about the law and prosecution policy relating to HIV and other STIs see the Crown Prosecution Service for England and Wales Guidance:

http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/

Proving that person A infected person B with HIV is difficult, especially where one or both parties is, or has been, sexually non-monogamous. A scientific test (phylogenetic analysis) can establish that the strains of

HIV in the complainant and the defendant are sufficiently similar to support the complainant's allegation, but it cannot prove the source, route or timing of transmission. Phylogenetic analysis can, however, establish that the defendant was NOT the source of the complainant's infection. For further information see: <http://www.hivlawandpolicy.org/resources/view/610>

The Recent Infection Testing Algorithm (RITA) can provide certain information about the timeframe of infection, but its use and reliability in criminal cases is not established. For further information see: <http://www.nat.org.uk/media/Files/Policy/2011/RITA%20Testing%20Report.pdf>

Further Resources (1) England, Wales and Northern Ireland

Books

Weait, Matthew (2007) *Intimacy and Responsibility: the Criminalisation of HIV Transmission*. Abingdon: Routledge Cavendish

Chalmers, James (2008) *Legal Responses to HIV and AIDS*. Oxford: Hart

Research Reports and Articles available online

Dodds, C., Bourne, A. and Weait, M. (2009) 'Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales' *Reproductive Health Matters*, 17(34):135–145 (available at http://www.sigmaresearch.org.uk/files/RHM34_Dodds_Criminalisation.pdf)

Dodds, C. et al (2005) *Grievous Harm: Use of the offences Against the Person Act 1861 for Sexual Transmission of HIV* (available at <http://www.sigmaresearch.org.uk/files/report2005b.pdf>)

Terrence Higgins Trust (2009) *Policing transmission: A review of police handling of criminal investigations relating to transmission of HIV in England and Wales, 2005-2008* (available at <http://www.tht.org.uk/informationresources/publications/policyreports/policingtransmission950.pdf>)

Guides and Practical Information

National AIDS Trust (2011) *Police Investigation of HIV Transmission: A guide for people living with HIV in England, Wales and Northern Ireland* (available at <http://www.nat.org.uk/Media%20library/Files/Policy/2011/Police%20Investigation%20of%20HIV%20Transmission%20ACPO%20leaflet%202011-3.pdf>)

Further Resources (2) International Resources

UNAIDS (2008) *Criminalization of HIV Transmission: Policy Brief* (available at http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf)

UNAIDS (2002) *Criminal law, public health and HIV transmission: A policy options paper* (available at http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf)